Supreme Court, U. S.
FILED
MAR 3 1978
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

CASE NUMBER A-498

77-970

ALTON SONSTEGARD,

Petitioner,

vs.

CITY OF KETTERING,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FORDE J. NEWBERRY,
CITY PROSECUTOR,
Counsel for Respondent,
3600 Shroyer Road,
Kettering, Ohio 45429
(513) 296-2400

TABLE OF CONTENTS

	Page
OPINION BELOW	1
MOTION TO AFFIRM OR DISMISS	2
STATEMENT OPPOSING JURISDICTION	2
QUESTION PRESENTED.	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.	3
STATEMENT OF THE CASE	4
ARGUMENT.	5
CONCLUSION: For all of the foregoing reasons, certiorari should be denied	9

TABLE OF AUTHORITIES

Cases:	Page
Cantwell v. Connecticut, 310 U.S. 296(1940).	7
Chaplinsky v. New Hampshire, 315 U.S. 568(1942)	5, 6, 7
Cincinnati v. Hoffman, 31 Ohio St.2d 163; 285 N.E.2d 714(1972).	6
Cincinnati v. Karlan, 39 Ohio St.2d 107; 314 N.E.2d 162(1974).	6
Cohen v. California, 403 U.S. 15 at 20(1971)	6
Cox v. Louisiana, 379 U.S. 536(1965).	5
Kent v. Kelly, 44 Ohio St.2d 43(1975).	6

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

CASE NUMBER A-498

ALTON SONSTEGARD,

Petitioner,

vs.

CITY OF KETTERING,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Supreme Court of Ohio dismissed the appeal of the petitioner on the 9th day of September, 1977, this dismissal entry appearing in petitioner's brief as Appendix 'A' therein. This appeal was taken from the adverse ruling of the Court of Appeals of the Second Judicial District of Ohio being

rendered on March 31, 1977, that opinion being reproduced in petitioner's brief as Appendix 'B' therein. The verdict of the jury and the judgement of the Kettering Municipal Court in which the petitioner was found guilty of the offense are reproduced as Appendix 'C' and Appendix 'D' of petitioner's brief therein.

MOTION TO AFFIRM OR DISMISS

The respondent-appellee moves this Court to dismiss the appeal herein, or, in the alternative to affirm the judgement of the Supreme Court and the Court of Appeals of Ohio for the Second Judicial District on the ground that it is manifest that the questions on which petitioners cause depends are so insubstantial as to need no further argument.

STATEMENT OPPOSING JURISDICTION

Jurisdiction does not lie with respect to the instant petition presented by appellant petitioner for the reasons enumerated below.

Petitioner presents no important statutory factual or constitutional issues as a basis for granting certiorari.

The decisions rendered by the courts below with respect to the facts as presented in the instant case are correct. Clearly, there is no decisional conflict between the courts and appellee-respondent through a motion to affirm or dismiss, herein contained, moves this court to dismiss appellant's petition for lack of jurisdiction based upon the fact that these exact issues have been previously decided by this court.

QUESTION PRESENTED

Section 648.04(a)(2) of the City of Kettering Municipal Ordinance which provides that:

> No person shall recklessly cause inconvenience, annoyance or alarm to another by making offensively coarse utterence or communicating unwarranted and grossly abusive language to any person.

complies with the constitutional prenumbras of the First and Fourteenth Amendments of the Constitution of the United States as neither vague nor overbroad. The United States Supreme Court has decided the requisite standards as to the constitutional validity of disorderly conduct statutes and the pertinent language of the Kettering City Ordinance has been authoritatively construed and narrowed by the Ohio Courts so as to comply with those requisite standards.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments of the United States Constitution and §648.04(a)(2) of the Kettering City Ordinances are set forth in appellant-petitioner's Appendix 'F' at page 10a and 11a therein.

STATEMENT OF THE CASE

On May 15, 1976, Defendant-Appellant was stopped by Kettering Police Officer Kenneth Castor for violation of Kettering traffic laws. An altercation ensued resulting in the Defendant-Appellant being arrested by Officer Castor for "disorderly conduct"; §648.04(a)(2) of the Kettering City Ordinances.

Pursuant to Defendant's not guilty plea, the matter was tried before a jury on June 16, 1976, whereupon the jury returned a verdict of guilty. Pursuant to the jury's verdict of guilty Defendant was sentenced to serve thirty days in Kettering Jail and fined $250.00 plus court costs, all but $100.00 of the fine being suspended and all but one day of incarceration being suspended.

During the course of the trial, Defendant-Appellant moved for dismissal based upon the unconstitutionality of Kettering City Ordinance §648.04(a)(2).

Defendant-Appellant's motion for dismissal was overruled. The decision of the Trial Court was affirmed by the Second Appellate District Court of Appeals.

The Kettering disorderly conduct ordinance fully complies with the requirements of the due process clause of the Fourteenth Amendment as proscribed by the United States Constitution.

ARGUMENT

Resort to epithets or personal abuse is not in any proper sense communication as safeguarded by the Constitution and its punishment, as a criminal act would raise no question under that instrument. Chaplinsky v. New Hampshire, 315 U.S. 568(1942).

This Court in Cox v. Louisiana, 379 U.S. 536(1965) emphatically rejected the contentions now set forth by the instant petitioner. In applying those standards as set forth in the numerous decisions by this Court, the Ohio Supreme Court has construed several ordinances having nearly identical language as that now before the Court as being limited to instances where there is no protected right, i.e., the "fighting words" test set forth in Chaplinsky v. New Hampshire, 315 U.S. 568(1942). Therefore, individuals may not be convicted under the Kettering disorderly conduct ordinance for the expression of any constitutionally protected freedom.

This Court has held that where the highest state court has limited the application of similar disorderly conduct statutes to instances where there is no protective right, then such statute is not impermissively vague or over broad. [1]

1
Coates v. Cincinnati, 402 U.S. 611(1971); Cohen v. California 403 U.S. 15(1971; Cox v. Louisiana, 379 U.S. 536(1965); Gooding v. Wilson, 405 U.S. 518(1972) and Lewis v. New Orleans, 415 U.S. 130(1974) are clearly distinguishable from Colton v. Kentucky, 407 U.S. 104(1972); Cincinnati v. Hoffman, 31 Ohio St.2d 163(1972) cert denied 93 Sup. Ct. 1370(1973) and Cincinnati v.Karlan, 416 U.S. 924(1974). In Coates, Cohen, Gooding and Lewis the statutes involved therein infringed upon the First and Fourteenth Amendments of the United States Constitution. Those state courts did not construe and narrow the application of those respective statutes and therefore, they were found to be unconstitutional.

The Ohio Supreme Court has limited the similar language of other ordinances to exclude consitutionally protected expression. Cincinnati v. Hoffman, 31 Ohio St.2d 163, 285 N.E.2d 714(1972), certiorari denied 93 Sup. Ct. 1370(1973); Kent v. Kelly, 44 Ohio St.2d 43(1975); Cincinnati v. Karlan, 39 Ohio St.2d 107, 314 N.E.2d 162(1974); 416 U.S. 924(1974).[2]

The Ohio Supreme Court in Hoffman went on further to express that the standard of conduct being specified within the ordinance imposes and "objective" tests as enumerated within the recent United States Supreme Court decisions on this issue.

In Cohen v. California, 403 U.S. 15 at 20(1971) citing Chaplinsky v. New Hampshire, U.S. 568(1942), this Court has also held that the: "States are free to ban the simple use without a demonstration of additional justifying circumstances, of so-called "fighting words", those personally abusive epithets, which, when addressed to the ordinary citizen are, as a matter of

common knowledge, inherently likely to provoke reaction".

Precisely, the doctrine of "fighting words" has its roots in Cantwell v. Connecticut, 310 U.S. 296(1940). The application of that doctrine was reaffirmed in Chaplinsky v. New Hampshire, 315 U.S. 568 at 571(1942), when this court observed that:

> Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances.

The opinion of the Ohio Court of Appeals for the Second Judicial District in affirming the conviction of the instant petitioner stated:

> But the Supreme Court of the United States has recognized the power to constitutionally punish words which by their very utterance tend to incite an immediate breech of the peace, and we are not convinced that an offensively coarse utterance or grossly abusive language can comfortably be suited to any other purpose.
>
> The nebulous character of such words as "coarse" and "abusive" must be calibrated by human sensibilities and such words thus provide to

> much roving room for constitutional validity, but when these adjectives are attended by such excisive words as "offensively" and "grossly", we are of the opinion that the narrowing process results in the "fighting words" which are not proscribed by the constitutional gaurantee of freedom of speech. (Emphasis added)
>
> Almost everyone should have some realistic notion of what constitutes unwarranted and grossly abusive language and that the suggestion that the words encompassed thereby, when directed to another person, would not tend to cause a breech of the peace requires beautific vision, supreme blessedness, and rare imagination. (Kettering v. Sonstegard, Court of Appeals for Montgomery County, Ohio, Case No. 5292 (unreported)(1977)).

Respondent asserts that the Court of Appeals for the Second Judicial District of Ohio accurately applied the requisite standards as set forth by this Court in affirming petitioner's conviction and in limiting the application of the ordinance in question. Petitioner has come to this Court claiming that the ordinance in question was neither narrowed nor in any way authoritatively limited to the "fighting words" test. The decision set forth above makes it obvious that petitioner's claim is erroneous.

CONCLUSION

For all of the foregoing reasons, certiorari should be denied.

Respectfully submitted,

FORDE J. NEWBERRY,
CITY PROSECUTOR,
Counsel for Respondent,
3600 Shroyer Road,
Kettering, Ohio 45429
(513) 296-2400